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No. _____

In The

Supreme Court of the United States

October Term, 1994

PEOPLE OF THE STATE OF MICHIGAN,

Petitioners,

v.

TIMOTHY LEE HENSICK,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE GRANT OF A RESPONDENT'S MOTION FOR NEW TRIAL BY A TRIAL JUDGE WHO HAS DEMONSTRATED HIS BIAS IN FAVOR OF THE RESPONDENT, AND AGAINST THE VICTIM, DEPRIVES THE VICTIM OF HER RIGHT TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE UNITED STATES CONSTITUTION?

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TIMOTHY LEE HENSICK,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Michigan

BRIEF OF PETITIONER PROSECUTING ATTORNEY RICHARD THOMPSON

Petitioner Richard Thompson, Prosecuting Attorney in and for the County of Oakland, State of Michigan, by Richard H. Browne, Assistant Prosecuting Attorney, on behalf of the People of the State of Michigan, respectfully prays that a writ of certiorari issue to review the opinion of the Michigan Court of Appeals entered in this proceeding on June 9, 1994.

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Supreme Court is in the form of an order denying leave to appeal filed January 25,

1995, and reported at 448 Mich 854 (1995). The decision of the Michigan Court of Appeals is dated June 9, 1994, and is unpublished. Copies of the order of the Michigan Supreme Court and the decision of the Michigan Court of Appeals are included in the Appendix to this Petition.

JURISDICTION

The order of the Michigan Supreme Court was filed on January 25, 1995. The jurisdiction of this Court is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which this petition involves are:

> Constitution of the United States, Amendment XIV, § 1:
>
> > All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent Timothy Hensick was charged with three counts of first-degree criminal sexual conduct [CSC]. MCL 750.520b; MSA 28.788(2). Respondent is a lawyer who is the son of a former Livingston County (Michigan) Circuit Judge. He had run for prosecutor against the current Livingston County Prosecutor. Therefore both the Livingston County Circuit Court bench and the Livingston County Prosecutor disqualified themselves from the case. The Oakland County (Michigan) Prosecutor's Office was brought in to conduct the prosecution and Judge G. Michael Hocking of Eaton County was assigned to sit as a visiting judge in Livingston County, Michigan.

Following a jury trial in Livingston County, Respondent was convicted by a jury as charged on all three counts. On November 25, 1991, Judge Hocking sentenced Respondent to three concurrent terms of 18 months to 10 years in prison. Respondent filed a claim of appeal and subsequently filed a motion for new trial in the trial court.

The Michigan Court of Appeals granted a motion to remand on April 14, 1992, to allow Respondent to pursue his motion for new trial. On November 13, 1992, Judge Hocking signed a written opinion which granted Respondent's motion for new trial. A written order granting the new trial was entered November 24, 1992. The Petitioner appealed from that order. The following summary of the testimony from the trial indicates the nature of the case and the parties' respective positions.

Respondent was the victim's lawyer; he represented her in a divorce action. At around 2:00 a.m. on a Sunday

morning, Respondent called the victim and told her he needed to talk to her. The victim agreed he could come over to her apartment. Once there, Respondent began kissing the victim and then sexually assaulted her. The victim herein clearly and specifically testified that she did not consent to the three sexual penetrations committed upon her by Respondent. The victim was 5'2" tall and weighed around 110 pounds. Respondent was taller and bigger than her. (R, 8-20-91, 100) The victim testified that Respondent forced himself upon her. He put his arms on her and "walked" her back up against a wall. (R, 8-20-91, 98-100) She tried to push him away. (R, 8-20-91, 98-99; 101-103) She asked him what he was doing and protested that she thought he must be crazy. (R, 8-20-91, 101) She told him she didn't want him to do this, but he did not stop. (R, 8-20-91, 103-104)

Respondent placed his mouth on her breast and she froze. She was scared and just couldn't say anything; she couldn't get anything out because of her fright. (R, 8-20-91, 105-106) Respondent then stuck his hand in her pants and placed his finger in her vagina. She tried at least twice to pull his hand out by grabbing his wrist, but he did not stop. (R, 8-20-91, 106-107)

Respondent took his penis out, grabbed the victim's hand, and forced her to touch his penis. She pulled her hand away, so he grabbed it and put it back on his penis. She felt numb; she just couldn't talk. (R, 8-20-91, 108) She didn't try to hit or hurt him because she was afraid of him; she didn't want to get hurt. She was afraid he would beat her up. (R, 8-20-91, 108-109)

Respondent then grabbed her hand and pulled her to the middle of the room. She didn't want to go with him, but she didn't feel she could stop him. (R, 8-20-91, 111) He told her to lay on the floor. She presumed he intended to have sexual intercourse with her, so she told him "No" – that she didn't want to get pregnant. (R, 8-20-91, 111-112)

Respondent went over and turned off the light. He then grabbed her hand again and pulled her to a chair. He pulled her to her knees and pulled off her shirt. When she tried to say she didn't want this, he told her: "Just relax. It'll be okay. Just relax." (R, 8-20-91, 112-113) He then pulled her head down onto his penis. She demonstrated that he had put both of his hands at the back of her head. She did not want this to happen. (R, 8-20-91, 113) She was worried Respondent was going to hurt her. When she tried to pull away by leaning back, Respondent pulled her mouth back down on his penis by putting his hands behind her head. He used his hands to make her head go up and down on his penis. (R, 8-20-91, 114-115) He kept telling her to, "Just relax."

He pushed her away from the chair, laid himself down on the floor, put a pillow behind his head, and then leaned up and grabbed the victim by her arm and pulled her over. (R, 8-20-91, 115-116) He grabbed her head again and pulled her mouth back down onto his penis. He forced her head up and down again. She tried to keep her head from moving, so he grabbed his penis with one of his hands and began masturbating into her mouth. He asked her if she'd ever done this to her husband. Since his penis was in her mouth, she couldn't respond. (R, 8-20-91, 117) It made her feel sick. She wanted to throw

up. (R, 8-20-91, 117-118) She was not able to make him stop doing this. Respondent ejaculated into her mouth. The victim grabbed her hair and spit the semen into the side of her hair. (R, 8-20-91, 118)

Respondent grabbed her by her arms and pulled her on top of him. She was crying. Respondent rolled her over onto the floor by putting his hands on her arm and pushing her over. He then started roughly grabbing and squeezing her breast. (R, 8-20-91, 119) The victim couldn't get away at this point because her back went out. Respondent was saying something, but she couldn't recall what it was. She just wanted him to get away from her. (R, 8-20-91, 120)

Respondent told the victim that he was going through a divorce, he'd had too much to drink, and he had stopped by his office to get her number. He asked her if she realized what had happened. She told him she was in shock. He then said to her: "You must have known how I felt about you when you first came into my office." (R, 8-20-91, 123)

Respondent left. The victim felt dirty. She took a shower, brushed her teeth, and rinsed her mouth out with mouthwash. (R, 8-20-91, 124-125) She then sat on her couch crying. She felt hurt and sad. Her breast hurt and her vagina hurt where Respondent had inserted his finger. Her back hurt also. These body parts had not hurt prior to Respondent's sexual assault. (R, 8-20-91, 125-126)

The victim called a sexual assault hot-line number. (R, 8-20-91, 126-167; R, 8-21-91, 3) She acknowledged that she had not used the word "force" to describe Respondent's actions. She explained that she felt "force" meant

being physically beat up, hit, or slapped. She described his actions as "persistent." (R, 8-21-91, 4) Respondent just wouldn't leave her alone – he kept coming after her when she tried to push him away. Respondent never asked the victim if she wanted sexual relations and she never gave him permission. (R, 8-21-91, 5) This victim became suicidal and had to be admitted to the Psychiatric Emergency Room at University of Michigan Hospital after she testified in open court at the preliminary examination about this rape.

Respondent admitted Ms. Ringe's allegations in all particulars except for alleging that he did not expose his penis, claiming that only one act of oral sex occurred, and claiming that the victim consented. (R, 8-29-91, 70-77) Respondent testified he went out to a basketball game with friends. Over about a five-hour period he allegedly consumed about four to five beers. (R, 8-29-91, 59-60) On his way home, at about 2:00 in the morning, he stopped at his office to call Tina Ringe and check his phone messages. (R, 8-29-91, 61) He claimed that he called Ringe and told her he "wondered if she wanted to talk." (R, 8-29-91, 62) He claimed that she answered affirmatively and told him her apartment number. (R, 8-29-91, 62) He claimed that when he arrived at her apartment they had a conversation in which he explained it was his "impression" that they had more than a business relationship. Her response to this was supposedly to smile and say, "Well." (R, 8-30-91, 69-70) After their "conversation" ended, he allegedly kissed her. (R, 8-30-91, 70) He claimed that he proceeded to have consensual sex with Tina Ringe initiating the oral sex, while he, ever the gentleman, tried to avoid ejaculating in her mouth. (R,

8-30-91, 75-76) He didn't try to have sexual intercourse with her (after all, this was only their first intimate encounter). After the sex was finished, he told her he'd call her the following day to make plans for dinner the following Friday and she allegedly told him, "Fine." He claimed that they parted amicably with her kissing him goodbye at the door. (R, 8-30-91, 78)

Respondent also presented witness Mark Lyon who testified that he'd questioned Tina Ringe about the alleged assault. He asked her if Respondent had used force and she said, "No." He asked if Respondent threatened her and she said, "No." He finally commented that it sounded like she was "a willing participant in this thing." Tina Ringe hesitated and then said, "Well, I guess I was." (R, 8-28-91, 158)

At the sentencing, the trial judge sentenced Respondent to three concurrent terms of 18 months to 10 years imprisonment. This was $6^1/_2$ years below the minimum sentence range recommended by the Michigan Sentencing Guidelines. The trial judge twice stated unequivocally that if he'd tried the case he would have acquitted the Respondent. (R, 11-25-91, 20; 56) He then made it abundantly clear that his belief in Respondent's innocence was going to control how he scored the sentencing guidelines and what sentence he would impose. He went out of his way to tell the Respondent what issues he believed should be raised in a motion for new trial or on appeal. (R, 11-25-92, 55-57) But the most telling indications of where the trial court's thinking was coming from were offered by the judge when he listed his reasons for departing below the sentencing guidelines. The trial judge stated:

Number four – the fact that the victim agreed to the Defendant's 2:00 a.m., Sunday morning visit is a mitigating circumstance, again with regard to the presence of an evil state of mind on behalf of the Defendant. This is not a perfect world, but as *common sense tells me that when a man calls a woman at 2:00 a.m. and says that he wants to come over and talk and he's – that's accepted*, a reasonable person, whether you want to shake your head or not, Ms. Maas, I haven't been living in a shell. *A reasonable person understands that that means certain things.* They may be wrong.

The next factor I've considered: The victim and the Defendant, in this case, were very familiar with each other, as opposed to an attack by a total stranger. The Guidelines don't give any consideration for that distinction. This is a mitigating factor, and the Milbourn court says it is. This is a mitigating factor as the Guidelines give it no consideration at all. And that's also a reason to go outside of the Guidelines.

Number six reason in determining the proportionate sentence, as well as going outside the Guidelines, as all previous five are, here for both purposes: One factor I have to consider is that *this was the weakest criminal case that resulted in a conviction that I've ever seen*, and I've been an attorney for 15 years, 14 of which I was a Prosecuting Attorney. The Guidelines don't consider that. (R, 11, 25-91, 44-45; emphasis supplied)

After relating the mitigating factors presented by Respondent's profession and past life, the trial judge further commented:

> In this regard, *I do not find any credible evidence that the victim consented to the Defendant's visit for professional reasons. The jury could believe whatever they want.* That was not based on an essential element of this offense. To me it defies reason and logic. And I'm the one that has to consider the Guidelines, not the jury. There [sic -that?] was not a fact found by the jury. I am finding it for the purposes of this sentence.
>
> (R, 11-25-91, 45-46; emphasis supplied)

The trial judge then listed the four main sentencing factors and stated that he had considered all of them and recognized that the decision of *People v. Milbourn*, 435 Mich 630; 461 NW2d 1 (1990) allowed departures from the Michigan Sentencing Guidelines where the sentencing guidelines hadn't sufficiently accounted for one or more of the factors. The trial judge them continued:

> Item nine – and I've considered this: The element of personal injury, as resulting from this occurrence, is tenuous, less clear cut and intertwined with preoffense-date trauma for which this Defendant was not a cause.
>
> Item ten: There is no evidence that the force used was anything other than the absolute minimum required to cross the threshold of force, which turned this into a crime, if you believe the findings of the jury. *And I'm forced to do that for this proceeding.*
>
> Number 11: A mitigating factor, although minor, is evidence that *the defendant helped the victim up off the floor after the occurrence.* Another mitigating factor – that the victim told a spouse-abuse agency the sex was not forced but resistance – her resistance was worn down by the

> Defendant's persistent request. I heard that sworn testimony, and I've considered it at sentencing. (R, 11-25-91, 46-47; emphasis supplied)

By order dated January 22, 1993, the Michigan Court of Appeals granted the Petitioner's application for leave to appeal from the grant of a new trial and consolidated it with pre-existing appeals 147862 and 146734 (an appeal by the Petitioner from the sentence imposed and an appeal by the Respondent from his conviction). In the appeal, Petitioner argued that the trial judge had been biased against the female victim (and also against the female assistant prosecutor who tried the case) because of their gender, and that this gender bias had been the underlying factor in the trial court's decision to order a new trial. In the sentencing appeal, Petitioner argued that the trial court's gender bias, as revealed by his comments at the sentencing, had been responsible for his decision to drastically depart from the minimum sentence range recommended by the Michigan Sentencing Guidelines.

On June 9, 1994, the Michigan Court of Appeals issued a 2-1 per curiam decision which affirmed the trial court's grant of a new trial. The Court found no merit to two of the four issues used by the trial court to justify its grant of a new trial. The Court also noted that the trial court's assessment of the prosecution's harmless error argument was erroneous because "Unfortunately, the trial court's personal view of this case clouded its vision as to the relative strengths of the parties' cases." (Opinion of the Michigan Court of Appeals, App. 8) The Court of Appeals also decided that "the trial judge on remand would have substantial difficulty putting out of his mind

his previously expressed views and findings, and to preserve the appearance of justice, retrial should be had before a different judge." (Opinion of the Michigan Court of Appeals, App. 8) The other two appeals were mooted by this decision. Judge Richard Griffin filed a dissenting opinion which found no merit in any of the reasons advanced for granting a new trial and went on to declare that the sentence imposed by the trial judge on Respondent was a "dramatic downward departure from the minimum sentences recommended by the sentencing guidelines" for reasons that "were blatantly inappropriate and unwarranted." (See Opinion of Court of Appeals, App. 12)

Petitioner sought leave to appeal or alternative summary relief in the Michigan Supreme Court, again arguing that the trial court's decision had been motivated by his gender bias against the female victim and the female assistant prosecutor. By order dated January 25, 1995, the Michigan Supreme Court denied the application for leave to appeal. Justices Boyle, Weaver, and Mallet would have granted the application. (App. 13-14)

Subsequent to the order of the Michigan Supreme Court, the Michigan Judicial Tenure Commission has issued a report dated April 10, 1995, finding that the trial judge's comments at the sentencing in this case "strongly suggest impermissible gender bias by implying the victim was somehow responsible for or invited the assault." *In the Matter of Hon. G. Michael Hocking*, Formal Complaint no. 48; Decision and Recommendation For Order of Discipline, Michigan Judicial Tenure Commission, p 5.

REASONS FOR GRANTING THE WRIT

I. THE GRANT OF A RESPONDENT'S MOTION FOR NEW TRIAL BY A TRIAL JUDGE WHO HAS DEMONSTRATED HIS BIAS FOR THE RESPONDENT AND AGAINST THE VICTIM DEPRIVES THE VICTIM OF HER RIGHT TO DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE UNITED STATES CONSTITUTION

> " * * * [J]ustice, though due the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."
>
> *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), quoting Justice Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S. Ct. 330, 78 L. Ed. 674 (1934).

The trial court in this case, and the appellate courts of the State of Michigan, have forgotten this wise admonition from Justice Cardozo. They have forgotten that, as Chief Justice Rehnquist observed in *United States v. Mechanik*, 475 U.S. 66, 72, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986):

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; ***victims may be asked to relive their disturbing experiences.*** * * * . (Emphasis supplied).

At a time when the Victim's Rights movement continues to gain recognition and support, this Court has already noted that such concerns have a proper place in

the mix of considerations which must be taken into account by a court deciding whether a new trial is merited. As this Court stated in *Morris v. Slappy*, 461 U.S. 1, 14-15, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983), courts should not forget:

> * * * to take into account the interest of the victim of these crimes in not undergoing the ordeal of yet a third trial in this case. * * * in the administration of criminal justice, courts may not ignore the concerns of victims. * * * The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources.

Similarly, in *United States v. Hasting*, 461 U.S. 499, 507, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983), the United States Supreme Court again admonished the lower court for failing to give any weight to "these relevant interests":

> * * * It did not consider the trauma the victims of these particularly heinous crimes would experience in a new trial, forcing them to relive harrowing experiences now long past, or the practical problems of retrying these sensitive issues more than four years after the events.

The trial court in this case did not consider the effect on the victim of a decision to require retrial of the case. In fact, the comments of the trial judge set forth above clearly demonstrate that the trial judge was biased against the victim, at least in part because of her gender. A decision granting a motion for new trial which is based on the trial judge's bias for or against one of the parties violates the right of the party to a fundamentally fair

trial; such a decision by a biased decision-maker thus violates the party's right to due process. Where the decision is based upon gender discrimination, it also violates the party's right to equal protection of the laws.

Due process of law and equal protection are rights possessed by all citizens. U.S. CONST. amend. XIV, § 1. That includes citizens who are victims of crimes. When a victim is subjected to the indignity occasioned by a second trial and forced to "relieve harrowing experiences now long past" because of the decision of a biased state trial judge, then the victim is deprived of the fairness that is the essence of due process of law and equal protection. "Due process requires that state criminal prosecutions be fundamentally fair." *Scruggs v. Williams*, 903 F.2d 1430, 1434 (CA 11, 1990). Due process requires that the proceedings, in this case a jury trial presided over by a judge, take place in an atmosphere free from bias and that determinations affecting the rights of the parties are made by an impartial judge - one who favors neither side.

Procedural rules exist to help insure that the proceedings will be conducted in a fair and impartial manner. The procedures used must "hold the balance nice, clear, and true between the State and the accused". *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). Nevertheless, experience teaches that impartiality sometimes is absent from a particular trial. To satisfy the stringent requirements of due process, our system strives "to prevent even the probability of unfairness." *In re Murchison, supra*, at 136. Accordingly, "to perform its high

function in the best way 'justice must satisfy the appearance of justice.' " *Id.* When that does not occur, the right to due process enjoyed by all citizens is violated.

The Constitution and the laws of this Country are structured so as to ensure that criminal defendants are convicted only after having received due process. They are to receive notice of the charges, the right to counsel, the right to confront and cross-examine their accusers, the right to compel the attendance of witnesses, the right to a speedy and public trial, and the right to an impartial jury which represents a cross-section of the community. U.S. CONST. amend. VI. They are also guaranteed the right to have the trial presided over by a neutral and objective magistrate who will rule on the questions of law that arise without bias and who will treat both sides equally and impartially. "The right to a fair trial is a 'basic requirement of due process' and includes the right to an unbiased judge." *Haupt v. Dillard*, 17 F.3d 285, 287 (CA 9, 1994), citing *In re Murchison, supra.*

Although a State is not a "person" and thus does not have a right to due process, *South Carolina v. Katzenbach*, 383 U.S. 301, 323-324, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966), a victim who is a citizen of the United States is clearly a "person" within the meaning of the Fourteenth Amendment and is thus entitled to due process and equal protection under that provision. The victim can only assert her right to due process and equal protection through the prosecutor who stands as her legal representative at the trial and on appeal. *Cf. Georgia v. McCollum*, 505 U.S. ___, 112 S. Ct. 2348, 2357, 120 L. Ed. 33, 49 (1992) ("As the representative of all its citizens, the State is the logical and proper party to assert the invasion of the

constitutional rights of the excluded jurors in a criminal trial. Indeed, the Fourteenth Amendment forbids the State from denying persons within its jurisdiction the equal protection of the laws.")

Moreover, there can be no question that the biased decisions of a state trial judge, acting in his judicial capacity by granting a new trial, constitute "state action." The trial judge is an elected official of the State of Michigan charged with presiding over the trial of legal disputes which arise under the laws of the State. His official decisions, whether they impact upon criminal defendants *or* their victims, clearly constitute "state action" within the Fourteenth Amendment. As this Court stated in *United States v. Classic*, 313 U.S. 299, 326, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." The Michigan Judicial Tenure Commission has determined that the trial judge who ordered the new trial in this case exhibited bias or the appearance of bias against the female victim and against the female prosecutor who tried this case.[1] This bias inevitably colored the trial judge's decision to grant a new trial in this case to the detriment of the female victim

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[1] As noted in the Statement of the Case, the Michigan Judicial Tenure Commission has issued a report finding that the trial judge's comments at sentencing "strongly suggest impermissible gender bias". The Michigan Court of Appeals, in the course of rejecting the trial court's application of the harmless error test to a claim of prosecutorial misconduct, also found evidence of bias by the trial court. (See Statement of the Case, pp 11-12; App. 8)

and the prosecution. "Surely, a State suffers a similar injury when the fairness and integrity of its own judicial process is undermined." *Georgia v. McCollum, supra,* 112 S. Ct. at 2357, 120 L. Ed. 2d at 49. Just as surely, the right of both sides to the impartial judge guaranteed under due process is violated where the official decisions of a trial judge result from the bias of that judge for or against a party.

In arriving at its decision in this case, the Michigan Court of Appeals did not consider the trial judge's improper bias or the victim's and the prosecution's right to a decision on the motion for new trial rendered by an unbiased judge. There can be no dispute that if a trial judge was shown to be biased against a defendant, any appellate court would immediately reverse an outcome-determinative ruling by the judge against a criminal defendant.

The public's confidence in the criminal justice system is undermined when a judge is allowed to set aside the verdict of a jury for reasons that reflect actual gender bias (or even the appearance of gender bias) against the victim and the prosecutor. As this Court stated in a similar context in *Georgia v. McCollum, supra,* 112 S. Ct. at 2353:

> * * * One of the goals of our jury system is "to impress upon the criminal defendant and the community as a whole that the verdict of conviction or acquittal is given in accordance with the law by persons who are fair." [citing *Powers v. Ohio,* 499 U.S. 400, 413, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).]

When the male jurist who presides over the trial of a politically-connected male lawyer for sexual assaults

committed on a female client makes statements expressing his preconception of the male defendant's innocence, makes blatantly sexist remarks in justifying a departure below the sentencing guidelines, and then subsequently grants a new trial on legal grounds that are meritless, the public cannot help but conclude that the "old boy's network" is functioning with the sanction of the judicial system. Paraphrasing this Court's observation in *Powers, supra,* 499 U.S. at 412: "this process condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the [judge's] neutrality and [his] obligation to adhere to the law."

Society has demonstrated its concern over fair treatment for the victims of crime by supporting constitutional amendments and legislation dealing with establishing specifically enumerated rights for victims. Michigan Const 1963, art 1, § 24 specifically guarantees the victim "the right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process."

This Court has demonstrated its concern that its processes and procedures should be free from unconstitutional bias such as gender bias or racial bias. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. ___, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994); *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The effect of the trial court's bias in granting a new trial to the Respondent is analogous to the unconstitutional gender bias which this Court has not hesitated to condemn.

A decision by a state official that results from gender bias violates the right to equal protection of the person who is detrimentally affected by the biased decision. This Court has recently found an equal protection violation where peremptory challenges are utilized on the basis of a bias against women. In *J.E.B. v. Alabama ex rel. T.B., supra,* this Court stated:

> * * * Since *Reed v. Reed,* 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971), this Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of "archaic and overbroad" generalizations about gender, * * * , or based on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.' " * * * .

If the trial judge in this case had rendered his decision granting a new trial while uttering remarks that made it clear the underlying basis for his decision was his bias against an African-American defendant, there can be little doubt that the mere fact that the decision itself was grounded in the judge's discretionary power would be insufficient to insulate that decision from review. Nor can there be any doubt that the reviewing courts would be duty-bound by the Equal Protection Clause to overturn such a decision emanating as it did from impermissible racial bias. The same result should have occurred in the instant case where the decision emanated from impermissible gender bias.

A refusal to grant relief will force the victim to re-live this ordeal. Petitioner firmly believes that a grant of a

new trial under these circumstances constitutes a grave miscarriage of justice and will deny the victim her right as a citizen, according to Fourteenth Amendment due process, to a fundamentally fair trial. The female victim's right under Fourteenth Amendment equal protection to a proceeding free from the effects of impermissible gender bias would also be violated.

The result of the decision of the Michigan Court of Appeals and the denial of leave by the Michigan Supreme Court is to trample the rights of the victim in this case and to force her to undergo the agony and oppressive atmosphere of another trial simply because of the refusal of the appellate courts to reverse the decision of a biased trial judge. The victim will be treated unfairly because the criminal justice system will have allowed the jury's decision to be unfairly set aside due to the legally unsupportable decision of a jurist who, as determined by both the Michigan Judicial Tenure Commission and the Michigan Court of Appeals, displayed clear evidence of bias against the female victim and her female attorney. The effect of the lower court rulings upholding the trial court's grant of a new trial will be to violate the victim's right to due process and equal protection because the decision below will have been rendered by a biased jurist who has discriminated against the victim because of her gender. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison, supra,* 349 U.S. at 136.

Petitioner is now requesting that this Honorable Court grant a writ of certiorari or other alternative summary relief and thereby declare that trial judges must

provide unbiased decision-making free from unconstitutional gender bias both in fact and in appearance.

CONCLUSION

WHEREFORE, Petitioner Richard Thompson, Prosecuting Attorney in and for the County of Oakland, by Richard H. Browne, Assistant Prosecuting Attorney, respectfully requests this Honorable Court to grant this petition for writ of certiorari to review the judgments of the Michigan Supreme Court and the Michigan Court of Appeals, or to grant summary reversal of those decisions and remand this case to the Michigan Court of Appeals for consideration of the issues raised in the appeals from Respondent's conviction and his sentencing.

Respectfully submitted,

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Prosecuting Attorney
Oakland County

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Chief, Appellate Division

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Date: April 25, 1995

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v TIMOTHY LEE HENSICK, Defendant-Appellant.	UNPUBLISHED June 9, 1994 No. 146734 LC No. 91-006537 FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v TIMOTHY LEE HENSICK, Defendant-Appellee.	Nos. 147682; 159459 LC No. 91-006537 FC

Before: Griffin, P.J., and Cavanagh H.A. Koselka,* JJ.

PER CURIAM.

Defendant, an attorney, was convicted by a jury of three counts of first degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), for sexually assaulting the complainant, whom he was representing in a domestic matter at that time. Defendant was sentenced to serve eighteen months to ten years in prison. His sentence has been stayed pending the results of this appeal.

*Circuit judge, sitting on the Court of Appeals by assignment.

Defendant appealed his convictions as of right and requested a remand to the trial court in order to file a motion for new trial. Plaintiff also appealed as of right, challenging defendant's sentence. This Court remanded the matter to allow defendant to move for a new trial. After a hearing, the trial court granted defendant's motion. Plaintiff also appeals that decision as of right. We affirm.

The complainant had sought defendant's help in filing for a legal separation from her husband. She met with defendant once in January, 1990, and had a few telephone conversations with him. In the early morning hours of April 29, 1990, defendant telephoned the complainant and stated that he needed to see her. The complainant thought he wanted to see her about her legal problem and agreed to allow him to come to her apartment. According to the complainant, when he arrived at the apartment, defendant coerced her against the wall where he penetrated her vagina with his finger and coerced her into two acts of oral sex. Defendant testified that the sexual contact occurred but that it was consensual.

The administrator of the Livingston Area Council Against Spouse Abuse (LACASA) reported that the complainant called the hotline about the assault around 4:00 a.m. on April 29, 1990. The manager of the building where complainant lived, and his wife, testified to seeing the complainant in a very distressed condition in the evening of April 29, 1990. The complainant's sister testified to receiving a telephone call from her at about 5:00 p.m. on April 29, 1990. When the sister arrived at the complainant's apartment, she was crying, quivering, shaking and stuttering, and told her sister what had

happened. The next day, the complainant told her cousin, a Warren police officer, what had happened and he called the state police. The state police trooper took a report from the complainant on May 3, 1990. The trooper testified that the complainant had trouble verbalizing what had happened and would occasionally burst out crying.

Sharon Bloom, a psychologist, was asked to accept the complainant as a client as a result of the complainant's call to the LACASA hotline. She saw the complainant for about two and-a-half months at which time the complainant had not yet recovered from the incident. Dr. Theresa Mackey, a psychiatric nurse, began seeing the complainant as a referral patient in June, 1990. She described the physical and emotional trauma suffered by the complainant and testified that the complainant's symptoms are identical to those reported by many women who have been raped.

Testifying on behalf of the defense, an attorney, who spoke with the complainant on the telephone a couple of weeks after the assault, testified that, in response to his questions, the complainant stated that she guessed she was a willing participant. Further, Dr. Gary Stollak, a psychologist, opined that it would be impossible to separate out the complainant's difficult past from her interpretation of the event at issue here. Defendant also presented three individuals who stated that he had a reputation for honesty and was a law-abiding person.

In this opinion, we address the issues raised by the prosecutor in his appeal from the grant of defendant's motion for new trial. Because one of the errors upon which the trial court based its order is one which would

support appellate reversal of defendant's conviction and because other irregularities in the proceedings materially affected substantial rights of defendant, this Court cannot say that the trial court abused its discretion in granting defendant a new trial. *People v Jehnsen*, 183 Mich App 305; 454 NW2d 250 (1990).

The trial court rested its order granting new trial on three errors involving (1) plaintiff's expert witnesses, (2) failure to comply with discovery orders and (3) prosecutorial misconduct.

With regard to plaintiff's expert witnesses, Sharon Bloom and Dr. Mackey, the trial court found that it had erroneously allowed the witnesses to present hearsay statements of the complainant. Although defendant also argues that neither Bloom nor Mackey were properly admitted as expert witnesses, the trial court did not address this issue. For guidance of the trial court at the new trial in this case, this court finds that both Bloom and Mackey were properly qualified as expert witnesses. *Berryman v K Mart Corp*, 193 Mich App 88; 483 NW2d 642 (1992).

At trial, both Bloom and Mackey were allowed to testify regarding statements made to them by the complainant pursuant to MRE 803(4). MRE 803(4) is an exception to the hearsay exclusion for

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the

> cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

At trial, the trial court admitted the hearsay statements through both witnesses based on *In re Freiburger,* 153 Mich App 251; 395 NW2d 300 (1986), which held that the MRE 803(4) exception should not be found inapplicable merely because the witness is not a physician.

In granting defendant's motion for a new trial, the trial court found that the hearsay statements were not admissible relying on *People v Beckley,* 434 Mich 691; 456 NW2d 391 (1990), and *People v LaLone,* 432 Mich 103; 437 NW2d 611 (1989). The trial court's reliance on *Beckley* is misplaced because it did not address hearsay statements but was instead concerned with expert testimony on behavior patterns of sexually abused children. In *LaLone,* a child sexual abuse case, the Court held that hearsay statements which identified the assailant were inadmissible when made to a psychologist. Almost a year after the decision in *LaLone,* this Court applied *In re Freiburger* to allow an expert to testify to statements of the victim where the statements were made to the expert by the victim as part of the diagnosis and treatment of the victim. *People v James,* 182 Mich App 295; 451 NW2d 611 (1990). This Court found that an expert may testify that abuse took place so long as the expert does not opine that the victim was actually abused at a specific time and place. *Id.* at 298.

Using the above case law as a guide, this Court finds that the trial court incorrectly ruled Bloom's testimony inadmissible. Bloom scrupulously avoided naming the

assailant and did not opine, during the original examination by the prosecutor, that the victim was actually abused at a particular time and place. However, the trial court's ruling that Mackey's testimony was erroneously admitted at trial must be upheld. Mackey's testimony violated all of the above rules. It contained statements which identified the assailant and which would lead the jury to believe that, in Mackey's opinion, the complainant was telling the truth. In addition, the circumstances and timing of the complainant's statements to Mackey make such statements inherently unreliable. The trial court properly granted defendant's motion for new trial on this issue.

The second basis for the grant of the new trial was the prosecutor's failure to turn over to defendant prior to trial a letter written to the state trooper by the complainant's sister and a note made by Dr. Okun of the University of Michigan and contained in Dr. Mackey's files. The complainant's sister's letter contained a slightly different sequence of events regarding the alleged assault than had been testified to by the complainant. Dr. Okun's notes talked about complainant's prior history of abuse. Defendant argued that, because he did not have this information prior to trial, he was not able to secure a proper expert in rebuttal to the prosecutor's experts and was unable to fully prepare a defense.

A defendant is entitled to have produced at trial all evidence bearing on guilt or innocence that is within the prosecutor's control. *People v Calloway*, 169 Mich App 810, 820; 427 NW2d 194 (1988), vacated on other grounds 432 Mich 904 (1989). If evidence is suppressed, the proper consideration is whether (1) suppression was deliberate,

(2) the evidence was requested, and (3) in retrospect, the defense could have significantly used the evidence. *People v Paris*, 166 Mich App 276, 283; 420 NW2d 184 (1988). In the instant case, there is no dispute among the parties that all the evidence at issue was requested and that the prosecutor did not deliberately suppress the evidence. However, the evidence, especially Dr. Okun's notes, could have been more significantly used at trial if it had been delivered prior to the start of trial. In addition, the cumulative effect of the hearsay evidence above and the lack of prompt delivery of this evidence denied defendant a fair trial and supports the trial court's grant of a new trial.

Finally, the trial court in granting defendant's motion for new trial found that the prosecutor's one sentence in a twelve-page opening statement at the start of an eight-day trial so impermissibly commented on defendant's right to remain silent that it could not be harmless error. This Court must disagree. The sentence referred to by the trial court commented on defendant's desire to answer no more questions during the investigation stage of this case prior to his arrest. In *People v Cetlinski*, 435 Mich 742, 760; 460 NW2d 534 (1990), the Court stated that

> The use of a defendant's silence during contact with the police that does not occur "at the time of arrest in the face of accusation," [*People v Collier*, 426 Mich 23, 39 (1986)], for impeachment purposes does not violate the Fifth Amendment or the Michigan Constitution.

Therefore, the prosecutor did not err in her statement in opening argument. However, even if the argument could be considered erroneous, it could not possibly have

denied defendant a fair trial as it was one sentence at the beginning of a long trial and the statement was not used again during the entire trial.

The trial court found that the error could not be harmless because the prosecution's case was so weak. This Court disagrees. Unfortunately, the trial court's personal view of this case clouded its vision as to the relative strengths of the parties' cases.

In summary, as a result of the inadmissible hearsay statements in the testimony of Dr. Mackey and the cumulative effect of the failure to disclose the sister's letter and Dr. Okun's notes, the trial court did not abuse its discretion in granting defendant's motion for a new trial.

In light of the affirmance of the trial court's grant of defendant's motion for new trial, it is unnecessary to address defendant's issues in his original appeal or the prosecutor's appeal of defendant's sentence.

Because we believe the trial judge on remand would have substantial difficulty putting out of his mind his previously expressed views and findings, and to preserve the appearance of justice, retrial should be had before a different judge. *People v Winans,* 187 Mich App 294, 301; 466 NW2d 731 (1991).

Affirmed and remanded in accordance with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Harvey A. Koselka

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

No. 146734
LC No. 91-006537 FC

v

TIMOTHY LEE HENSICK,

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

No. 147862; 159459
LC No. 91-006537 FC

v

TIMOTHY LEE HENSICK

Defendant-Appellee.

Before: Griffin, P.J., and Cavanagh and H.A. Koselka,* JJ.

GRIFFIN, P.J. (dissenting).

I respectfully dissent. I would reverse the lower court order granting defendant's motion for a new trial and reinstate defendant's convictions.

Furthermore, I find the below the guidelines' minimum sentences of eighteen months to be disproportionately lenient and therefore invalid. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and *People v Lankey*

* Circuit judge, sitting on the Court of Appeals by assignment.

(After Remand), 198 Mich App 187; 497 NW2d 571 (1993). I would remand for resentencing before a different judge. *People v Evans*, 156 Mich App 68, 72-73; 401 NW2d 312 (1986).

I

The lower court judge clearly abused his discretion in granting defendant a new trial. I agree with the majority that the trial judge erred in granting defendant's motion based upon the testimony of Sharon Bloom and upon the prosecutor's alleged comment on defendant's right to remain silent. I disagree with my colleagues that reversible error occurred through the testimony of Nurse Theresa Foley Mackey, Ph.D., or by the prosecutor's untimely exchange of potential evidence.

Theresa Foley Mackey is a nurse employed at the University of Michigan School of Nursing. Nurse Mackey has a bachelor of science degree in nursing, a masters of science in nursing, and a Ph.D. in education. She is a specialist in mental health nursing.

In June 1990, the complainant sought treatment from Nurse Mackey for symptoms that the complainant related to the alleged rape. The symptoms included sleep disturbances, stress, fatigue, gastrointestinal disturbances, nausea, low back pain, and cognitive dysfunction. Nurse Mackey stated that she began complainant's treatment with an evaluation which included a patient history.

While testifying and relating the history given by the complainant, Nurse Mackey identified defendant as the alleged perpetrator of the crime. This hearsay evidence

was seized upon by the trial judge in granting defendant's motion for a new trial and is cited by the majority as one of their reasons for finding Nurse Mackey's testimony to be reversible error. I respectfully disagree.

In the present case, there was no disputes to the identity of defendant. Defendant's identity was not at issue. Defendant does not contest that he was with the complainant and that sexual acts occurred between them. Rather, it was defendant's position that the sexual acts were consensual. Under these circumstances the hearsay testimony of Nurse Mackey identifying defendant as the perpetrator was not prejudicial and therefore not error requiring reversal. MRE 103(a).

The more difficult issue is whether Nurse Mackey improperly vouched for the credibility of the complainant. When viewed in context, I find no error requiring reversal. MRE 803(4) and *People v Meeboer (After Remand)*, 439 Mich 310; 484 NW2d 621 (1992). Nurse Mackey expressed her opinion that the physical symptoms that the complainant was experiencing were related to the rape based upon the history as given by the complainant. Further, Nurse Mackey testified that such symptoms are common for rape victims who have suffered traumatic experiences. I find such statements to be within the field of expertise of Nurse Mackey. MRE 702.

Moreover, the alleged error regarding this testimony is nonconstitutional in nature. As such, "the defendant must show a reasonable probability that the error affected the outcome of the trial." *People v Hall*, 435 Mich 599, 609, n 8; 460 NW2d 520 (1990). After thorough review, I am convinced that the disputed testimony had little or no

affect on the verdict. Accordingly, if error occurred by the admission of this testimony, I would hold the error to be harmless. *People v Mosko,* 441 Mich 496, 502-503; 495 NW2d 534 (1992); MCL 769.26; MSA 28.1096; MCR 2.613(A).

Finally, I find no prejudice resulting from the late exchange of the letter written by the complainant's sister and the note of Dr. Okun. Defendant was entitled to a fair trial, not necessarily a perfect one. *Delaware v Van Arsdall,* 475 US 673, 681; 106 S Ct 1431; 89 L Ed 2d 674 (1986), *People v Van Tassel (On Remand),* 197 Mich [App] 653, 655; 496 NW2d 388 (1992). Defendant received a fair trial.

II

Defendant was sentenced to concurrent terms of eighteen months to ten years' imprisonment for three counts of first-degree criminal sexual conduct. MCL 750.520b; MSA 28.788(2). The sentences imposed by the lower court were a dramatic downward departure from the minimum sentences recommended by the sentencing guidelines.

In my judgment, the reasons relied upon by the trial judge for departing from the sentencing guidelines were blatantly inappropriate and unwarranted. I would reverse the disproportionately lenient sentences, *Lankey, supra,* and remand for resentencing before a different judge. *Evans, supra.*

/s/ Richard Allen Griffin

Order
Entered: January 25, 1995

Michigan Supreme Court
Lansing, Michigan

James H. Brickley
Chief Justice

Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

100068-70

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TIMOTHY LEE HENSICK,

Defendant-Appellee.

SC 100068-70
CoA 159459, 146734, 147862
LC 91-6537-FC

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Boyle, J., states as follows:

I dissent. I would grant leave to appeal. No finding was made at trial that the prosecutor was aware of information that was not made available to defendant. The defendant had knowledge of the fact that complainant had a prior history of abuse before trial, received all the information in Dr. Theresa Foley Mackey's file during

trial, was offered the opportunity to recall the complainant and declined to do so, did not then seek a continuance, and actually presented the material to the jury. Given this context, leave should be granted to determine whether the testimony of witness Mackey was error requiring reversal, to determine whether there was any violation of a discovery order, and, if so, whether defendant was prejudiced.

Weaver, J., concurs in the dissenting statement of Boyle, J.,

Mallett, Jr., J., would grant leave to appeal

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 25, 1995 /s/ Corbin R. Davis